Supreme Court, U.S.
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No. 93-1786

In The

Supreme Court of the United States

October Term, 1993

GALIN CORPORATION AND PETROPAK, INC.,

Petitioners,

v.

MCI TELECOMMUNICATIONS CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether disposition of a case by pretrial or in trial rulings and denial of impanelment of a jury is proper where undisputed facts under the contentions of the parties present only questions of law.

II.

Assuming procedural notice and opportunity to respond were not afforded, whether such denial is harmless error where the facts could not be disputed or additional evidence could not be adduced.

RULE 29.1 STATEMENT

The parent corporation of MCI Telecommunications Corporation is MCI Communications Corporation. MCI Telecommunications Corporation owns a minority interest in Global Communications, Inc., an Alaska corporation.

Petitioners' list of parties is otherwise correct.

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TO THE UNITED STATES SUPREME COURT:

MCI Telecommunications Corporation ("MCI") presents this Brief in Opposition to the Petition for Writ of Certiorari by Galin Corporation and Petropak, Inc. ("Galin/Petropak").

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Galin/Petropak have misstated the decisional facts to leave the impression that they sought relief avoiding the release which precluded their claims, thus they were entitled under the Seventh Amendment to a jury resolution of putative waiver and fraud grounds for relief. They have failed to refer to the record in support of statements made and they speculate on evidence which would not be admissible had it existed or had it been offered. The record of proceedings shows that Galin-Petropak never sought to avoid the release that precluded recovery, waived supposed error in trial court rulings, and never attempted a proffer of evidence they now speculate would ensure a jury trial.

1. The Central Dispositive Fact

Galin/Petropak gave MCI many releases up to May 13, 1988, all of which in unambiguous language released MCI from any and all claims in any matter whatsoever. (Defendant's trial exhibit 6) The last release is duplicated in the appendix at 1.

In their petition (pp. 19, 20) Galin/Petropak state that the releases could not have released MCI from a cause of action involving misrepresentation of rock because they were unaware of the facts concerning rock probes until the lawsuit was filed and discovery occurred. That factual statement is false.

The construction contract was for laying fiber optic cable through the foothills of the Appalachian Mountains, notorious for hard rock. Galin/Petropak admitted in the

pretrial order that it inspected the route many times before the contract was signed (R. 2222 paragraph 6.5) and "Before contracting with MCI, Galin/Petropak became concerned about the rock to be encountered". (R. 2222 Paragraph 6.6) All of the documentary evidence demonstrates beyond cavil that Galin/Petropak knew of the existence of rock by inspection before construction. They became aware of facts they claim support recovery based upon misrepresentation before or during construction and before releases were signed. Defendant's trial exhibit 65 and Plaintiffs' trial exhibit 94, authored by Galin/Petropak in early February, 1988, discuss the need to file a claim with MCI based upon rock excavations where rock probes showed no rock. Galin/Petropak expounded upon their theme of misrepresentation by rock probes in their February 15, 1988, letter to MCI. (Plaintiffs' trial exhibit 98) Excerpts of these documents are reproduced in the appendix at 3-6.

The contract documents repeatedly advised Galin/Petropak, before they bid the job, to beware of all conditions affecting the bid and work, admonished them to inspect and investigate the site, warned that they were required to assess factors affecting the work, and plainly informed them no claims for financial adjustment would be permitted based upon faulty information. Risk of loss due to site conditions was placed upon Galin/Petropak. (Defendant's trial exhibits 2 and 3)

Galin/Petropak became aware of their supposed cause of action for misrepresentation by rock probes long before May 13, 1988, the filing of the lawsuit or discovery. The release precluded any such claim then known.

The contract between the parties in unambiguous language required Galin/Petropak to present MCI with timely written claims specifically detailing any labor, equipment or material charges. (Defendant's trial exhibit 3, §18.0) Twenty claims that constitute the entire basis of Galin/Petropak's lawsuit (including misrepresentation by rock probes) were **untimely** presented after termination of the contract. Significantly, the latest date Galin/Petropak claimed to have performed any labor or used any equipment and materials was May 1, 1988, before the final release. (Plaintiffs' trial exhibits 114 and 169) Unless Galin/Petropak sought to avoid the release on some ground, then the release precluded all claims in their lawsuit.

2. Contentions of the Parties

The amended joint pretrial order signed by the parties and the trial court (R. 2238) contained the contentions of the parties that framed the limits of the contest. Galin/Petropak contended that no document or conduct on their part released MCI from any claim in the litigation (R. 2225 Paragraph 5.A.15); MCI contended Galin/Petropak released it from any claim on any matter whatsoever based upon work done prior to May 13, 1988. (R. 2224 Paragraph 5.B.5) The parties admitted that Galin/Petropak had never given MCI a final release of lien and indemnity against claims for work and materials by others (R. 2221 Paragraph 6.12), as required by §39.1 of the contract to release retainage, but Galin/Petropak simply denied that on May 13, 1988, they unconditionally and without reservation released MCI from any and all

claims in any matter whatsoever. (R. 2219, Paragraph 7.17)

Galin/Petropak did not contend or even intimate anywhere in the amended joint pretrial order that the release was ambiguous, that it was procured by duress, that it was vitiated by fraud, that it had been waived, that it lacked consideration, or any other defense in the nature of avoidance of the release. Galin/Petropak admitted in their brief in the Court of Appeals that the release is clear and unambiguous. (appellants' Brief, pp. 21, 22)

In their petition to this Court Galin/Petropak state (p. 2) that they asserted waiver of the release or that it was procured by fraud. Nowhere in their pleadings or the pretrial order did they do so. The statement in the petition is false. The state of the case presented to the trial court and the Court of Appeals was that Galin/Petropak released MCI from all claims and did not seek to avoid the release.

3. Procedure at Trial

When this case was called for trial the "first item of business" under the trial court's local procedures was admission of documentary evidence. (Appendix at 2) MCI objected to two classes of Galin/Petropak's offered trial exhibits pertinent to the case: those referable to site conditions and assumption of risk on site conditions and those bearing upon the settlement process between the parties before suit was filed. The trial court sustained objections to both classes. (R. 2312 pp. 27, 32, 46) All of Galin/Petropak's exhibits except those excluded were admitted. All of MCI's exhibits were admitted. Galin/

Petropak's statement in their petition (p. 4) that "most" of their trial exhibits were excluded is false. Only 24 of 169 were excluded and none of those bear upon any issue raised by the petition.

The body of documentary evidence before the trial court included the release dated May 13, 1988, the parties' agreement stated in the pretrial order that MCI terminated the contract as of July 14, 1988 (R. 2222 Paragraph 6.11), and Galin/Petropak's untimely claim number seven for clean up work that included no labor, equipment or materials beyond the date of the release.

A series of motions and rulings occurred limiting the testimonial evidence to post-release occurrences (R. 2312, pp. 47, 51), excluding offered deposition testimony concerning events prior to the release (R. 2312, pp. 52-54, 55), and excluding claim seven, purportedly involving clean up after the release, because it was untimely on its face. (R. 2312, pp. 67, 84) When Galin/Petropak conceded to the trial court that the only possible claim extending beyond the release involved clean up (R. 2312, p. 72), nothing remained to be tried. The trial court asked the pointed question "On what issues will we be going to trial" in response to Galin/Petropak's request to proceed with trial. (R. 2312, p. 87) Galin/Petropak replied: "On all the issues that are still left in the case, which I think **relate to all the documentary evidence** that we have in. As a matter of fact, the court has admitted most of our exhibits as I understand, into the record." (R. 2312, p. 87)

MCI asked the trial court to render judgment and articulated the reasons. (R. 2312, p. 89) The discourse before the trial court demonstrates a motion for judgment

under Fed.R.Civ.Pro. Rule 50(a) was plainly made; indeed, Rule 50(a) was read to Galin/Petropak. (R. 2312, pp. 94-97)

Immediately before the trial court granted respondent's motion for judgment, Galin/Petropak made "an offer of proof on everything that the Court has excluded." (R. 2312, pp. 97, 98) The offer was referable to excluded exhibits and deposition testimony previously offered, as to which nothing further than the original offer was required. Galin/Petropak did not thereafter offer any other identifiable evidence. Their statement in their petition (p. 4) that the trial court refused to allow a bill of exceptions of live testimonial evidence is false because none was offered. Irrespective, no such testimony would have been admissible in light of the release and Galin/Petropak's refusal to attempt to avoid it.

4. Waiver of Supposed Errors

Galin/Petropak have never complained of the trial court's limiting instruction precluding any testimonial evidence of events giving rise to a claim before the May 13, 1988 release. They do not now complain of the exclusion of Plaintiffs' exhibits or deposition testimony.

Galin/Petropak complain the trial court erred in failing to consider proffered but excluded parol testimony on waiver of the time limit to file claims, but they did not proffer any such testimony. They speculate that such witnesses might have testified favorably, but they do not present a record of proffer of any such testimony.

ARGUMENTS SUPPORTING DENIAL OF THE WRIT

1. Summary

The controlling issue is whether Galin/Petropak were entitled to impanelment of a jury under the Seventh Amendment even though no material fact issues were triable. Pretrial or in trial disposition of a case before impanelment of a jury cannot present error when a party cannot prevail as a matter of law on conclusively proven, unambiguous facts. Because the release was admittedly unambiguous and unchallenged and the documentary evidence offered and admitted conclusively demonstrated no entitlement to recovery, Galin/Petropak's petition is clearly not worthy of certiorari.

The subsidiary issue is whether denial of procedural notice and opportunity to respond is harmful error when no further evidence could be offered under substantive law and the contentions of the parties. Galin/Petropak offer speculation about what they might have proffered, but that speculative evidence would not have been probative and admissible. If error occurred in the procedural disposition of the case below, the error is harmless.

The Court of Appeals said the trial court's disposition was effectively done under Fed.R.Civ.Pro. Rule 56(c), but the case was clearly disposed of under Rule 50(a).

Since the standard of review for either is the same the Court of Appeals' result is sound: whether the summary judgment record or the trial exhibits are considered, the outcome is the same because Galin/Petropak did not challenge the validity of the release and they could not offer evidence of an interpretation of the release. If the

Court of Appeals erred in construing the trial court's disposition, the error is harmless.

Galin/Petropak's implied complaint is that no jury was present and that one must be impaneled for Rule 50(a) to apply. They sponsor no authority that the parties were not **in jury trial** because no jury was present. In essence, Galin/Petropak complaint of a right under the Seventh Amendment to the **presence** of a jury, irrespective that no fact issues were triable.

MCI's position is that the release and Galin/Petropak's failure to challenge it on avoidance grounds precluded any triable issues and therefore any right to a jury trial. Whether one characterizes the trial court's disposition as a pretrial ruling or an in trial ruling is immaterial because Galin/Petropak have not been harmed.

2. Seventh Amendment Claim

The constitutional right to a trial by jury in civil cases is conditional. If fact issues do not exist to be tried, then the Seventh Amendment is not implicated. *Parklane Hosiery Company, Inc. v. Shore*, 439 U.S. 322, 336, 337, 99 S. Ct. 645, 654, 58 L.Ed.2d 552 (1979).

It would be foolish to insist upon the impanelling of a jury as a constitutional right to hear undisputed facts which must result in a judgment as a matter of law, yet that is Galin/Petropak's demand. If the demand were more than folly and had any substance, then the power of trial courts to dispose of cases with undisputed facts would be nonexistent. Trial courts could not expedite disposition of an action by eliminating frivolous claims or

entering pretrial orders that control the course of the action. Fed.R.Civ.Pro. Rule 16(c)(1) and (e); *United States v. Hougham*, 364 U.S. 310, 315, 81 S.Ct. 13, 17, 5 L.Ed.2d 8 (1960). They could not peremptorily dismiss an action after plaintiff's opening statement establishes no right to recover, *Best v. District of Columbia*, 291 U.S. 411, 54 S.Ct. 487, 78 L.Ed. 882 (1934); *Oscanyan v. Arms Company*, 13 Otto 261, 103 U.S. 261, 26 L.Ed. 539 (1880), but would be required to allow the introduction of evidence which would not alter the result. Summary judgments would be unconstitutional.

MCI emphasizes that the breadth of Galin/Petropak's demand in this case annihilates any notion of docket or case control by any trial court in all civil actions except equity cases. If the principle were established that undisputed facts **must** be tried to a jury, then concomitant with that principle is denial of the right to grant judgments as a matter of law or judgments n.o.v. The power of trial courts to decide questions of law upon undisputed facts necessarily negates the right to a jury trial. To be entitled to a jury and in order to be entitled to relief in this Court Galin/Petropak must first demonstrate that a material fact issue existed.

3. The Merits of the Release Issue

Galin/Petropak pays scant attention to the applicable New York substantive law applicable to the release issue. *Metz v. Metz*, 572 N.Y.S.2d 813, 815 (N.Y.App.Div. 3rd Dept. 1991), cited by Galin/Petropak, is authority against its position because the release there and here was admittedly unambiguous, its interpretation was a matter for

the courts, and Galin/Petropak never claimed the release was procured by fraud. Their fraud claim was that rock information had been misrepresented, not that the contract was procured by fraud. *Angerosa v. White Co.*, 290 N.Y.S. 204 (N.Y.App.Div. 4th Dept. 1936), is thus inapplicable. *Herman v. Malamed*, 487 N.Y.S.2d 791 (N.Y.App.Div. 1st Dept. 1985), involved an ambiguity where parol evidence of intent was admissible on a claim of mutual mistake. Galin/Petropak did not claim ambiguity or mutual mistake.

The joint pretrial order signed by the trial court and the parties "conclusively established the issues of fact and law in the case and . . . govern[ed] the course of the trial" *U.S. v. Hougham, supra*, at 364 U.S. 315, 81 S.Ct. 17. Since Galin/Petropak did not challenge the validity of the release and admit it is unambiguous, any claims of avoidance were waived. *Valley Ranch Development Co., Ltd. v. F.D.I.C.*, 960 F.2d 550, 554 (5th Cir. 1992); *Flannery v. Carroll*, 676 F.2d 126, 129 (5th Cir. 1982).

Galin/Petropak could not have offered any admissible testimony before a jury bearing upon the meaning or intent of the release or bearing upon an avoidance of it. When the release was proved, without objection by Galin/Petropak, the trial court was bound to give judgment measured by New York substantive law.

New York law governing the effect of the release has been cogently explained in the trial court's memorandum and in the opinion of the Court of Appeals, both appended as part of Galin/Petropak's petition. Nothing would be gained by a repetition here of that learning.

MCI respectfully refers the Court to the trial court's memorandum (Petition, pp. 80-89) and the opinion below (Petition, pp. 42-47) in the interest of brevity. Under New York law the release is absolute and unconditional and released MCI from any claims as of May 13, 1988.

New York law and the correctness of application of that law by the courts below does not and cannot pose any conflict among circuits or with this Court's precedents nor is it an important issue of federal law with significant practical consequence. No unsettled question of federal constitutional law is embedded in application of settled New York law to the undisputed facts of this diversity contract dispute. Since Galin/Petropak could only show entitlement to relief if New York law favored them on the release, their petition here is not worthy of certiorari.

The release is dispositive of all claims in the lawsuit because none of Galin/Petropak's claims involved labor performed or equipment or material used beyond the date of the release. To the extent the courts below additionally denied Galin/Petropak relief upon their waiver claim, it constitutes icing on a cake. None of Galin/Petropak's claims were timely, but had they been they were released.

4. Rule 50(a)

MCI believes the case was disposed of under Fed.R.Civ.Pro. Rule 50(a) and correctly so. Disposition under that Rule was not unusual but disposition against Galin/Petropak was inevitable. The case had been called to jury trial and the parties had announced ready.

Exhibits were admitted as the **first order of business at trial** and precluded Galin/Petropak's claims conclusively.

Galin/Petropak does not deny trial had begun. They simply contend, without supporting authority, that a trial is not a jury trial for purposes of the Rule until a jury is impaneled, even though no further evidence **can** be admitted and the inevitable result will not change.

The sophistry of their position denies its validity. The Advisory Committee's comments following the Rule plainly state the 1991 revision "authorizes the court to perform its duty to enter judgment as a matter of law at any time during the trial, as soon as it is apparent that either party is unable to carry a burden of proof that is essential to that party's case." That time occurred when the release was admitted into evidence, was not challenged, and could not be interpreted by parol evidence.

5. Harmless Error

Galin/Petropak does not claim the trial court's limiting order on evidence was error and any error was thus waived. In the face of the ruling Galin/Petropak could not have adduced any evidence before a jury other than trial exhibits already admitted in evidence. Any claimed error in denial of a jury's presence is harmless.

If the trial court's disposition was not in trial, then necessarily it was pretrial. It is immaterial to Galin/Petropak's due process rights[1] whether disposition is

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[1] Galin/Petropak predicates its due process argument upon the Fourteenth Amendment. However, no state action was

considered as a pretrial disposition under Fed.R.Civ.Pro. Rules 16 or 56(c) or a disposition under Fed.R.Civ.Pro. Rule 50(a) because denial of the presence or impanelement of a jury or time limits set forth for pretrial disposition presents harmless error if undisputed facts under applicable law would not change the result. *Chaparro-Febus, Inc. v. International Longshoremen Associated, Local 1575*, 983 F.2d 325 (1st Cir. 1992); *Powell v. U.S.*, 849 F.2d 1576 (5th Cir. 1988); *Bowles v. U.S. Army Corps of Engineers*, 841 F.2d 112 (5th Cir. 1988), *appeal dismissed, cert. denied*, 488 U.S. 803, 109 S.Ct. 33 (1988); *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir. 1993); *Gregg v. U.S. Industries, Inc.*, 715 F.2d 1522 (11th Cir. 1983), *reh'g granted in part, clarified* [on other points], 721 F.2d 345 (1983), *cert. denied*, 466 U.S. 960, 104 S.Ct. 2173 (1984).

The standard for granting summary judgment is the same as under Rule 50(a). *See*, trial court's memorandum. (Petition, pp. 72-76) Only different procedure applies. The procedural safeguards of notice and opportunity to respond – whether during a pretrial conference, on summary judgment or during trial on a Rule 50(a) motion – are necessarily wedded to a requirement that a different result would probably occur had procedure been observed. In other words, the party deprived of procedural safeguards must demonstrate harm.

Considering the trial court's disposition as a summary judgment and based upon the summary judgment record, Galin/Petropak have not and cannot show they

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involved in this diversity case tried under federal rules of procedure. Any due process was guaranteed by the Fifth Amendment.

have been harmed, because no different result would have occurred. These juridical facts do not change: Galin/Petropak did not seek to avoid the release, the release was unambiguous, and no affidavit evidence bearing upon intent or interpreting the release would have been probative. Galin/Petropak were no better off in a summary judgment proceeding than they were at trial. They could not have come forward with any admissible probative evidence under governing law to avoid the inevitable outcome. If the trial court or the Court of Appeals erred in disposition of the case procedurally, the utter lack of substantive merit of Galin/Petropak's case and their inability to change their contentions rendered the error harmless. Galin/Petropak's speculation about evidence they could have introduced is irrelevant in light of the governing substantive law and does not demonstrate harm.

CONCLUSION

The trial court's question to Galin/Petropak asking what issues would be triable by a jury is still unanswered by them. Juries exist to try disputed facts. No right of jury trial in civil cases exists for undisputed facts. Denial of a jury presence or trial was not error, but if error, was harmless error.

The Court of Appeals' judgment of affirmance was correct and certiorari should be denied. MCI so prays.

Respectfully submitted,

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APPENDIX

EXCERPT FROM DEFENDANT'S TRIAL EXHIBIT 6

CONTRACTOR'S CERTIFICATION

The undersigned Contractor Certifies that the work covered by this Invoice has been actually completed in accordance with the Contract Documents. The Contractor further certifies and represents to MCI that all amounts due his subcontractors and suppliers, under all previous Invoices for which payments have been received by MCI, have been paid by him to such subcontractors and suppliers. It is further certified that all applicable Federal/ State payroll taxes and payroll Insurances, applicable to the work covered by the Invoices submitted thus far, have been paid.

In Consideration of payments made heretofore, or to be made based upon this Invoice for labor, material, equipment, subcontract work, and any and all costs Incurred for the performance of the contract work Invoiced thus far, the Contractor hereby unconditionally and without reservation releases and Indemnifies MCI and their offices, agents, employees, assignees and heirs from any and all liens, claims, demands, penalties, losses, costs, damages and liability in any matter whatsoever.

Date Signed: 5-13-88 Signature: /s/ H. M. Lingle

Name: H. M. Lingle

Title: Vice-President

EXCERPT FROM TRIAL COURT LOCAL PROCEDURES

H. Exhibits.

****

3. All exhibits will be offered and admitted into evidence as the *FIRST ITEM* of business at trial. The Court will admit all exhibits listed in the Final Pretrial Order into evidence unless opposing counsel files written objections supported by authority at least three (3) business days before trial.

****

(Boldface in original)

EXCERPTS FROM DEFENDANT'S TRIAL EXHIBIT 65, CONTRACTOR'S MEETING NOTES FEBRUARY 7, 1988

****

- Rock from Cahawba River to Roper Road has been cut.

  Pre-rip take-offs (rock reports) can be wrong for 3 reasons according to Sandy:

  1. Weren't recorded at all.
  2. Weren't recorded correctly i.e. ripped 300 ft. and wrote down 100 ft.
  3. Some areas not ripped i.e. creek bottoms.

- Rock on west side of lake is about 200 ft. (at Queenstown)

****

- Bob asked "What do the rock probes show in this area?"

- Sandy, "About 4500 ft. of shallow probes, indicating the possibility of rock. The ground is fairly flat."

****

- Sandy's rock theory is: The probes show where rock is not! If probe is to 36" depth, then no rock.

- Our plow con-records should be a pretty good indicator of where we found and handled rock. Also:

  MCI plow records
  Rock sawing and cutting records
  Pre-rip notes

  We have not written letter to MCI yet on rock. Sandy will get them one soon.

****

EXCERPT FROM PLAINTIFFS' TRIAL EXHIBIT 94,
CONTRACTOR'S CORRESPONDENCE TO FILE
FEBRUARY 8, 1988

****

RE: MCI Claims

A following is a list of items we have discussed regarding claims. I would appreciate additional input in order to provide a more complete list.

2. Rock exists where probes show 36".

****

EXCERPT FROM PLAINTIFFS' TRIAL EXHIBIT 98,
CONTRACTOR'S LETTER TO MCI
FEBRUARY 15, 1988

****

Rock

I have continued to give considerable thought to the rock work we have done on the project. This situation is unusual in that the project has been bid twice, without and with probes as part of the representations on the drawings. I have isolated the following important points:

1. MCI, by showing the probes in the second bid, accrued cost savings by giving the contractors this definitive rock information. Our bid was greatly reduced based on this information.

2. In our bid, after understanding how the probes were taken (manually), the only information we considered from the probes was were [sic] rock did not exist (i.e., if a probe was made to full depth, there was no rock at that point).

3. Further, we concluded that rock may not exist where probes were not to full depth. The manual probe may have hit soft rock, stiff clay, or rubble rock that can be excavated or plowed in the normal manner and not require extraordinary effort and methods for its removal.

4. For the first bid, and for the bid leading to this contract, we used county soils maps to aid in determining rock locations. We also consulted an engineer with the US Department of Agriculture who works in the project area and made a two day field trip with him. From this information we made what we considered to be a very educated estimate of rock quantities.

We have mentioned to you that our estimate of rock was 30,000 feet. We have encountered considerably more. I feel we should except our contractual obligations to deal as required with this rock except where it is represented not to exist. Therefore, we will request compensation in accordance with our calculated price for removing that quantity of rock encountered where shown not to exist per the probes.

****